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Pasdec Putra Sdn Bhd v Suara Hati Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02-(NCVC)(W)-1528–07 OF 2017
TENGKU MAIMUN, AHMADI ASNAWI AND ZABARIAH YUSOF JJCA
21 JUNE 2018

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Contract — Building contract — Claim — Non-completion of project within stipulated time — Termination — Certification of termination — Claim by contractor for works done — Dispute on percentage of works completed — Whether proven by parties — Whether there was breach of contract — Whether claim supported by evidence — Whether calculation for claim for payments for completed works based on measurement done on site

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The appellant ('the defendant') entered into a contract with the respondent ('the plaintiff') where the latter was appointed as the contractor for a project. The plaintiff was to complete the whole project within 18 months from the date of the possession of the site (19 September 2012). The defendant however terminated the contract by issuing a certificate of non-completion. The plaintiff filed an action at the High Court against the defendant and argued that it had completed the project up to 37% and therefore claimed, inter alia, for the value of 37% of the project. The defendant argued that the plaintiff had caused extreme delay to the project and the works done were only 27.15%. The defendant also counterclaimed for RM14,866,506.29. The High Court judge allowed the plaintiff's claim on the 37% completion for RM2,529,246.16 and dismissed the defendant's counterclaim. Hence this appeal. The defendant submitted that: (a) the plaintiff breached the contract and failed to complete the project within time; (b) the contract had been terminated; (c) the plaintiff admitted there was delay/non-completion; (d) the letter stating 37% works done was not the last letter issued on the percentage of works done and was also not the value of work done on site; and (e) the plaintiff did not adduce any evidence to support its claim on percentage of works done.

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Held, allowing the appeal in part:

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(1) The calculation of the work done by the plaintiff must be done on site. It was the evidence of the defendant's quantity surveyor ('SD1') that she did the measurement of the plaintiff's work on site and from her calculation, the plaintiff had only completed 27.15% of the work. The trial judge misdirected herself in relying solely on the defendant's letters and in

rejecting the evidence of SD1 who was more than qualified to testify on the final calculation of the plaintiff's work (see paras 21 & 25).

(2) The plaintiff did not dispute that the project had been delayed notwithstanding various extensions given. There was no specific format of notice prescribed by the contract. The failure of the defendant to give a separate notice on the LAD and/or the failure to issue a final account did not absolve the plaintiff's liability to pay the LAD at the agreed rate (see paras 28–29).

(3) The defendant had not produced the sale and purchase agreements with the various purchaser to support its claim for LAD in respect of late delivery of the houses to the purchasers. The defendant also failed to prove the amount claimed being in difference between the contract sum and the additional cost and expenses incurred by the defendant to complete the project. The summary of payment tendered by the defendant was not sufficient proof of the amount claimed against the plaintiff for the differential sum under the contract (see paras 31–32).

[Bahasa Malaysia summary

Perayu ('defendan') telah menandatangani kontrak dengan responden ('plaintif') di mana ia dilantik sebagai kontraktor untuk satu projek. Plaintif dikehendaki menyelesaikan keseluruhan projek dalam masa 18 bulan dari tarikh milikan tapak tersebut (19 September 2012). Walau bagaimanapun, defendan menamatkan kontrak dengan mengeluarkan perakuan tak siap. Plaintif memfailkan tindakan di Mahkamah Tinggi terhadap defendan dan menghujahkan bahawa ia telah menyiapkan projek tersebut sehingga 37% dan oleh itu mendakwa, antara lain, untuk nilai 37% daripada projek itu. Defendan berpendapat bahawa plaintif telah menyebabkan kelewatan terlampau bagi projek tersebut dan kerja-kerja yang dilakukan hanyalah 27.15%. Defendan juga menuntut balas RM14,866,506.29. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif bagi penyelesaian sebanyak 37% iaitu RM2,529,246.16 dan menolak tuntutan balas defendan. Oleh itu rayuan ini. Defendan menghujahkan bahawa (a) plaintif melanggar kontrak dan gagal menyelesaikan projek tersebut dalam masa yang ditetapkan; (b) kontrak telah ditamatkan; (c) plaintif mengakui terdapat kelewatan/kegagalan menyiapkan; (d) surat yang menyatakan 37% kerja yang dilakukan bukan surat terakhir yang dikeluarkan bagi peratusan kerja yang dilakukan dan juga bukan nilai kerja yang dilakukan di tapak; dan (e) plaintif tidak mengemukakan sebarang bukti untuk menyokong tuntutannya terhadap peratusan kerja yang dilakukan.

Diputuskan, membenarkan sebahagian rayuan:

(1) Pengiraan kerja yang dilakukan oleh plaintif mesti dilakukan di tapak. Adalah menjadi keterangan juruukur kuantum ('SD1') bahawa dia

melakukan pengukuran kerja plaintif di tapak dan berdasarkan pengiraannya, plaintif hanya menyempurnakan 27.15% kerja. Hakim bicara tersalah arah apabila semata-mata bergantung pada surat defendan dan menolak keterangan SD1 yang lebih daripada layak memberi keterangan tentang pengiraan akhir kerja plaintif (lihat perenggan 21 & 25).

(2) Plaintif tidak membantah bahawa projek itu telah ditangguhkan meskipun pelbagai lanjutan diberi. Tiada format khusus notis yang ditetapkan oleh kontrak. Kegagalan defendan memberi notis berasingan mengenai LAD dan/atau kegagalan mengeluarkan akaun akhir tidak membebaskan liabiliti plaintif untuk membayar LAD pada kadar yang telah disetujui (lihat perenggan 28–29).

(3) Defendan tidak mengemukakan perjanjian jual beli dengan berbagai pembeli untuk menyokong tuntutannya terhadap LAD bagi serahan lewat rumah kepada para pembeli. Defendan juga gagal membuktikan jumlah yang dituntut sebagai perbezaan antara jumlah kontrak dan kos dan perbelanjaan tambahan yang dikeluarkan oleh defendan untuk menyelesaikan projek tersebut. Ringkasan bayaran yang dikemukakan oleh defendan bukan bukti yang cukup bagi jumlah yang dituntut terhadap plaintif bagi jumlah perbezaan bawah kontrak (lihat perenggan 31–32).]

Notes

For cases on claim for building contract in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3920–3944.

Cases referred to

Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd [2008] 2 MLJ 87, CA (refd)

Legislation referred to

Evidence Act 1950 ss 102, 103

Appeal from: Civil Suit No 22 NCVC-34–06 of 2016 (High Court, Kuantan)

A Ramanathan (Norhuda bt Abdul Rahman with him) (Loke Chew & Zainal) for the appellant.

Mohd Rafaei bin Adnan (Mohd Hazwan bin Hamidun with him) (Rafaei & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant ('the defendant') against the order of the High Court in allowing the respondent's ('the plaintiff's') claim and in dismissing the defendant's counterclaim. We had allowed the defendant's appeal in part. We now state our reasons.

BACKGROUND FACTS

[2] The defendant entered into a contract with the plaintiff where the plaintiff was appointed as the contractor for the 'Proposed Development of Bandar Putra Housing ('Fasa 4') consisting of 54 units of two storey and 2 1/2 storey Semi-D houses on Lot 28735 Mukim Kuala Kuantan, Pahang (Pakej 6A8)' ('the project').

[3] The total contract sum was RM16,669,379.13 and the plaintiff was to complete the whole project within 18 months from the date of possession of the site. The possession of the site was on 19 September 2012. For phase 1 (Block A consisting of 12 units), the completion period (which was 12 months) expired on 19 September 2013. For phase 2 (Block B/C/D consisting of 42 units), the 18 months period expired on 19 March 2014.

[4] The relevant terms of the contract are cll 40 and 55 which are re-produced below:

40.0 DAMAGES FOR NON-COMPLETION

40.1 If the contractor fails to complete the works by the date for completion or within any extended time granted pursuant to clause 43, the SO shall issue a certificate of non-completion to the contractor. Prior to the issuance of the certificate of non-completion, the SO shall issue a notice to the contractor informing the contractor the intention of the Government to impose liquidated and ascertained damages to the contractor if the contractor fails to complete the works by the date for completion or within any extended time granted.

40.2 Upon the issuance of the certificate of non-completion, the Government shall be entitled to recover from the contractor liquidated and ascertained damages calculated at the rate stated in appendix from the period of the issuance of the certificate of non-completion to the date of the issuance of certificate of practical completion or the date of termination of this contract. The SO may deduct such damages from any money due or to become due to the contractor failing which such damages shall be recovered from the

performance bond or as a debt due from the contractor. The SO shall inform the contractor in writing of such deduction.

55.0 CERTIFICATE OF TERMINATION COSTS

55.1 As soon as the arrangements for the completion of the works made by the Government enable the SO to make a reasonably accurate assessment of the ultimate cost to the Government of completing the works following the termination of the contractor's employment and the engagement of the other contractors or persons, and the amount of direct loss and/or damage caused to the Government due to the termination has been ascertained by the SO, then the SO may issue a certificate (hereinafter referred to as the 'certificate of termination costs') stating the completion cost (hereinafter defined) and the final contract sum (hereinafter defined).

55.2 The completion cost comprises the following sums, costs or expenditure:

(a) the sums previously paid to the contractor by the Government;

(b) the sums paid or payable to other contractors or persons engaged by the Government to complete the works;

(c) any sums paid to subcontractors or suppliers under clause 60;

(d) any costs or expenditure incurred or to be incurred including on-cost charges incurred by the Government in completing the works; and

(e) the amount of direct loss and/or damage caused to the Government to the termination.

(It was understood between the parties that all references to 'the Government' in the contract refers to Pasdec Putra Sdn Bhd, the defendant).

[5] The agreed rate between the parties for the liquidated and ascertained damages ('LAD') under cl 40 was RM4,600 per day.

[6] It was not in dispute that the plaintiff was given three extensions of time ('EOT') as follows:

(a) EOT 1 — Phase 1 — until 15 May 2014
Phase 2 — until 15 October 2014;

(b) EOT 2 — Phase 1 — until 27 March 2015
Phase 2 — until 21 May 2015; and

(c) EOT 3 — Phase 1 — until 30 September 2015
Phase 2 — until 30 September 2015

[7] On 13 August 2015, the defendant wrote to the plaintiff on 'KEMAJUAN KERJA YANG SANGAT KURANG MEMUASKAN' where the defendant stated among others that 'Sehingga ke tarikh surat ini, kemajuan kerja tuan sepertimana mesyuarat tapak No 27 pada 26 Julai 2015 sepatutnya mencapai 89% tetapi kemajuan yang dicapai setakat ini adalah hanya 37% iaitu ketinggalan sebanyak 52%. Tuan membiarkan keadaan di tapak tergantung tanpa sebarang aktiviti di tapak. ... Tuan adalah dikehendaki memulakan kerja tuan semula dan menjalankan kerja tuan dengan lebih cergas lagi. Sekiranya tuan gagal memenuhi kehendak perenggan ini dalam tempoh 14 hari selepas penerimaan notis ini ... pengambilan kerja tuan di bawah kontrak ini akan ditamatkan ...'.

[8] By a letter dated 6 October 2015, the defendant terminated the contract. The material parts of the letter read:

> 2. Dukacita diperhatikan bahawa tuan masih didapati tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan dijangka tidak dapat disiapkan pada Tarikh Siap Kerja yang telah ditentukan pada 30 September 2015. Kerja tuan sepatutnya sudah siap 100% siap tetapi kemajuan yang dicapai setakat ini adalah hanya 37%. Kegagalan tuan itu masih berterusan sungguhpun tuan telah diberi Notis Untuk Tujuan Penamatan Kontraktor seperti yang disebutkan di atas.
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> 3. Maka sejajar dengan Fasal 51 Syarat-Syarat Kontrak, pengambilan kerja tuan adalah dengan ini DITAMATKAN.
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> ...
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> 4. Kerja akan disiapkan sejajar dengan Fasal 51.1 (c) Syarat-Syarat Kontrak, dan tuan adalah dikehendaki menanggung segala perbelanjaan berlebihan yang akan timbul akibat daripada penamatan pengambilan kerja tuan.

[9] The plaintiff appealed against the notice of termination. Vide a letter dated 12 November 2015, the defendant rejected the appeal stating, inter alia:

> Pihak kami mendapati dengan prestasi, kapasiti dan cara pengurusan tapak yang telah pihak pengurusan YM Dato' tunjukkan pada kami serta dengan tempoh lanjutan masa yang diberikan selama 18 bulan iaitu menyamai tempoh kontrak Asal menjadikan 36 bulan masa untuk menyiapkan projek adalah satu peluang yang sewajarnya telah kami berikan kepada YM Dato'. Bagi makluman pihak YM Dato' sepanjang tempoh 36 bulan prestasi kemajuan kerja di tapak hanya mencapai 32% sahaja. Oleh yang demikian pihak kami tidak berkeyakinan pihak YM Dato' dapat menyiapkan projek ini dengan hasil prestasi kemajuan kerja yang ditunjukkan di tapak bina.

[10] The certificate of non-completion was issued by the defendant on 6 June 2016 and a new contractor took over the project on 9 June 2016. On 14 June 2016, the plaintiff filed the instant suit against the defendant.

A PROCEEDINGS IN THE HIGH COURT

[11] The plaintiff's case was founded on the termination letter dated 6 October 2015. The plaintiff did not challenge the termination of contract as such, but pleaded that it had completed the project up to 37% and thus claimed, for, inter alia, the value of 37% of the project. Paragraphs 14, 15 and 20 of the statement of claim read:

> 14. Plaintiff menyatakan bahawa kemajuan kerja Plaintif yang diperakui oleh Defendan (di dalam surat bertarikh 12/11/2015) setakat 06/10/2015 adalah pada kadar 37% daripada nilai kontrak yang bersamaan dengan RM6,167,670.28 tidak termasuk bahan-bahan binaan yang masih belum dipasang (unfixed material).
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> 15. Plaintif menyatakan nilai kerja yang masih belum dibayar oleh Defendan kepada Plaintif setakat 6/10/2015 adalah sebanyak RM2,529,246.16 setelah mengambilkira bayaran yang diterima oleh Plaintif daripada Defendan sebanyak RM3,683,424.12.
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> ...
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> 20. Plaintif telah mengalami kemudaratan yang berterusan apabila suatu penghakiman ingkar telah direkodkan oleh Credit Guarantee Corporation Malaysia Berhad terhadapnya bagi suatu jumlah RM1,443,322.70 pada 10-5-2016 melalui guaman sivil ... di atas pinjaman yang dibuat bagi menjalankan kerja kontrak Defendan tersebut ....

[12] The defendant, vide its amended statement of defence and counterclaim pleaded that the plaintiff had caused extreme delay to the project and that the final calculation of all the works done by the defendant was only 27.15%. The defendant counterclaimed for RM14,866,506.29 comprising of the following:

(a) RM2,147,086.02 being the difference between the contract sum and the additional cost and expenses incurred by the defendant to complete the project;

(b) RM11,656,400 being the total LAD due and payable by the plaintiff to the defendant under the contract; and

(c) RM1,063,020.27 being the LAD due and payable by the defendant to their purchasers for late completion and delivery of the houses.

[13] Having heard the witnesses, the learned trial judge allowed the plaintiff's claim on the 37% completion for RM2,529,246.16 and dismissed the defendant's counterclaim. For ease of reference, we reproduce the relevant findings of the learned judge:

> [29] Adakah peratusan kerja siap adalah 37% setakat surat penamatan?
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> Asas tuntutan Plaintif adalah berdasarkan surat bertarikh 6/10/2015 ... dan surat bertarikh 13/8/2015 ... Kedua-dua surat penamatan dan niat penamatan

menyatakan tahap peratusan kerja siap setakat surat-surat tersebut diisukan kepada Plaintif adalah 37%. ... Defendan menafikan jumlah peratusan siap kerja melalui saksi SD1 iaitu Jurukur Bahan Defendan dengan menyatakan peratusan kerja siap adalah 27.15% sahaja. SD1 menyatakan ia adalah perkiraan akhir yang dibuat oleh SD1 setelah diminta berbuat demikian.

[30] SD1 pada masa yang sama juga tidak menafikan bahawa jumlah 37% yang dinyatakan di dalam kedua-dua surat dan notis yang dihantar oleh Defendan kepada Plaintif tetapi menyatakan ianya bukan muktamad dan merupakan satu anggaran sahaja. Apabila meneliti kandungan surat-surat tersebut, tiada di mana-mana kandungan surat tersebut menyatakan jumlah 37% adalah satu anggaran semata-mata atau sekurang-kurangnya menyatakan satu kiraan akhir atau muktamad akan dikemukakan kepada Plaintif kemudian. SD1 sendiri bersetuju bahawa Sijil Muktamad tidak pernah diserahkan kepada Plaintif.

[31] Peratusan kerja yang dinyatakan oleh SD1 hanya timbul semasa SD1 memberi keterangan dan ianya tidak pernah diberitahu kepada Plaintif melalui sebarang surat. Jika dirujuk kepada Pernyataan Pembelaan Defendan dan Tuntutan Balas bertarikh 1/8/2016 di perenggan 3.3 menyatakan:

> 3.3 Mengikut penilaian akhir oleh Perunding Defendan, nilai kerja siap sebenarnya ialah 30.5% daripada keseluruhan projek.

Dalam keadaan yang sama juga tiada keterangan menunjukkan jumlah 30.5% tersebut dimaklumkan kepada Plaintif. Pada masa yang sama juga SD1 menyatakan Defendan telah menyatakan jumlah peratusan kerja adalah 32%. Kesemua jumlah berbeza-beza yang dinyatakan oleh SD1 tidak pernah dimaklumkan kepada Plaintif pada ketika notis penamatan diberikan kepada Plaintif. Mahkamah ini mendapati tiada ketetapan di pihak Defendan mengenai jumlah peratusan kerja siap.

[32] Pembelaan Defendan dengan jelas menyatakan peratusan kerja siap oleh Plaintif adalah 30.5% dan pada masa perbicaraan peratusan kerja siap telah bertukar menjadi 27.15% tanpa penjelasan yang munasabah. Perkara yang menjadi persoalan ialah apakah jumlah peratusan kerja siap sebenar yang hendak dibuktikan oleh Defendan di sini. Adakah 37%, 32%, 30.5% atau 27.15%? Dalam semua keadaan tersebut, Mahkamah ini mengambilkira surat dan notis penamatan bertarikh 6/10/2016 sebagai jumlah peratusan siap kerja oleh Plaintif berjumlah 37%. Ini adalah kerana itulah satu-satunya surat penamatan kontrak yang diterima oleh Plaintif. Mahkamah percaya sekiranya Defendan bertegas bahawa peratusan siap kerja sejak awal lagi hanyalah 27.15%, maka Plaintif juga akan memfailkan tuntutannya berdasarkan jumlah yang dinyatakan. Jumlah 37% adalah jumlah yang dikira dan diberitahu oleh Defendan kepada Plaintif dan ianya bukan jumlah yang ditentukan oleh Plaintif sendiri.

[14] Aggrieved by the decision of the High Court, the defendant appealed to this court.

THE APPEAL

[15] Before us, learned counsel for the defendant submitted that the learned judge erred in dismissing the counterclaim by failing to consider:

A (a) that the plaintiff had breached the contract and had failed to complete the project within time;

(b) that the contract had been terminated;

(c) that the plaintiff admitted that there was delay/non-completion even after three EOTs given; and

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(d) that the letter stating 37% of work done was not the last letter issued on the percentage of work done and was also not the value of work done on site.

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[16] It was further submitted for the defendant that the learned judge erred in allowing the plaintiff's claim as the plaintiff did not adduce any evidence to support its claim on percentage of work done and that the learned judge erred in relying on the defendant's letter dated 6 October 2015 over the calculation by the defendant's appointed quantity surveyor. The calculation by the defendant's quantity surveyor was done after every site visit and reported at every site meeting.

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[17] For the plaintiff, it was submitted that the learned judge was correct in entering judgment for the plaintiff and in dismissing the defendant's counterclaim. Learned counsel for the plaintiff argued that the defendant failed to issue a notice informing the plaintiff of the defendant's intention to impose LAD under cl 40.1 and that the certificate of final account under cl 55 of the contract was never issued. Given those failures, the plaintiff contended that the defendant was not entitled to the counterclaim.

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OUR FINDINGS

[18] Under ss 102 and 103 of the Evidence Act 1950, the burden lies on the plaintiff to prove that they had completed 37% of the project. We found that the plaintiff led no evidence to support its case of 37% completion except to rely on the defendant's letter. In this regard, the learned judge, in her grounds of judgment alluded to the defendant's letters dated 13 August 2015 and 6 October 2015.

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[19] We noted from the statement of claim that the plaintiff did not plead the letters dated 13 August 2015 and 6 October 2015. What was pleaded by the plaintiff as apparent from para 14 of the statement of claim quoted above, was the defendant's letter dated 12 November 2015. And what was stated by the defendant in its letter dated 12 November 2015 was not that the plaintiff had completed 37% of the work but 32% completion. If the plaintiff were to rely on the defendant's letter, then surely it cannot choose one letter over the other. Likewise, if the learned judge found the defendant's letters to be conclusive evidence of the percentage of the plaintiff's work, Her Ladyship

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ought to have also considered the subsequent letter written by the defendant to the plaintiff dated 12 November 2015, which she failed to do. The letters could not therefore be the basis to determine conclusively the 37% completion claimed by the plaintiff.

[20] Further, the plaintiff through its Managing Director, Dato' Raja Hamzah bin Raja Hitam ('SP1') admitted that the 37% was not based on valuation of work on site.

[21] This being a building contract, the calculation of the work done by the plaintiff must be based on measurement done on site. Indeed, it was the evidence of the defendant's quantity surveyor, Sharifah Norizzati bt Syed Saifudeen ('SD1') that she did the measurement of the plaintiff's work on site and from her calculation, the plaintiff had only completed 27.15% of the work. SD1 testified as follows (appeal record 2A: pp 90–91):

6 Q: Apakah penglibatan kamu dalam projek ini?

A: Saya bertanggungjawab membuat pengiraan nilai kerja kontraktor dan dalam kes ini atas kerja-kerja Plaintif DAN juga kiraan untuk pembukaan tender baru untuk ambilalih dan menyiapkan projek tersebut selepas kontrak Plaintif ditamatkan.

...

8 Q: Mengikut perkiraan akhir kamu selepas kontrak ditamatkan berapakah nilai kerja-kerja yang telah siap oleh Plaintif atas tapak projek?

A: *Hanya 27.15% sahaja*

9 Q: Boleh terangkan bagaimana kamu mendapat jumlah 27.15% ini?

A:

Jumlah yang telah dibayar kepada kontraktor (termasuk GST untuk interim 18 sebanyak RM10,033.35)	RM3,648,457.18
Jumlah wang tahanan	RM 447,698.18
Jumlah interim 19 RM 45, 867.42}	
Jumlah kiraan akhir RM217,033.86}	RM 262,901.28
Jumlah keseluruhan	RM4,525,751.05

Peratusan dari nilai yang telah diambil kira

RM4,525,751.05 x 100% = 27.15%

RM16,669,379.13

Nilai kerja ditapak oleh Plaintif ialah 27.15% sahaja selama 3 tahun.

[22] The learned judge rejected the evidence of SD1 on the grounds that the amount of 27.15% was not informed to the plaintiff by any letter and that the methodology for calculation was not provided by SD1.

[23] Whilst we accept that the certificate of non-completion and the final account was not prepared and served by the defendant to the plaintiff, the percentage of 27.15% was based on measurement done of the plaintiff's work on site. SD1 had been authorized to do the final calculation and had adduced more than sufficient justification and explanation on the methodology on the final calculation at 27.15% (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87).

[24] There were 29 site meetings prior to termination of the contract and in the minutes of those site meetings, nowhere was it stated that the plaintiff had achieved 37% completion of the work. In fact, in the minutes of site meeting No 28 on 31 July 2015, the plaintiff itself reported that their work progress was at 32%. Needless to say, whatever percentage stated by the parties prior to the measurement by SD1 remained provisional and could not be the basis to enter judgment for the plaintiff for the value of work done.

[25] We therefore found that the learned judge had misdirected herself in relying solely on the defendant's letters dated 13 August 2015 and 6 October 2015 and in rejecting the evidence of SD1 who was more than qualified to testify on the final calculation of the plaintiff's work. More so, when the plaintiff mounted no rebuttal or challenge on SD1's evidence on 27.15% completion of the work.

[26] The learned judge in her grounds of judgment stated that 'Pembelaan defendan dengan jelas menyatakan peratusan kerja siap oleh plaintif adalah 30.5% dan pada masa perbicaraan peratusan kerja siap telah bertukar menjadi 27.15% tanpa penjelasan yang munasabah'. With respect, the learned judge overlooked the fact that the court had allowed amendment to the statement of defence. The 30.5% was pleaded in the original statement of defence whereas 27.15% was the pleaded case of the defendant in its amended defence. Her Ladyship therefore erred in concluding that 'pada masa perbicaraan peratusan kerja siap telah bertukar menjadi 27.15% tanpa penjelasan yang munasabah'. Obviously, the explanation was the amendment to the defence.

[27] One other point on the plaintiff's claim for the 37% completion. The plaintiff knew that the 37% was not the valuation of work done on site. There was no evidence that the plaintiff had requested the defendant for joint inspection or measurement of the plaintiff's work. It appeared from the evidence of SP1 that the plaintiff was merely taking an easy way out to claim from the defendant the amount that would cover the plaintiff's liability to its lender as adverted to in para 20 of the statement of claim and was thus taking advantage of the defendant's letters. This could be seen from the following testimony of SP1 (appeal record 2A: p 81):

A: Kita dapat surat terminate mengatakan 37%, jadi kita tuntut hanya 37% sahaja, kita gunapakai yang Pasdec tidak pergi bersama value di site. Jadi tidak mahu buang masa pada masa itu, saya ikut sahaja dengan nilai 37%. Oleh itu saya minta Yang Arif boleh kira daripada 37% surat daripada Pasdec, jadi itu sahaja yang saya tuntut. Kemudian balance itu yang saya tuntut, dia bayar saya baru 3 juta, kalau 37% x 16 juta harga kontrak, bermakna lebih kurang 6 juta lebih. Saya hendak yang balance itu sahaja.

Sebab projek dibiayai oleh CGC, jadi saya menanggung sekarang ini hutang CGC lebih kurang 1.4 juta lagi, jadi itu saya hendak claim dan hendak cover yang sana. ...

[28] On the counterclaim, we similarly found that the learned judge misdirected herself in failing to consider that the plaintiff did not dispute that the project had been delayed notwithstanding various extensions given and that the plaintiff had agreed to pay RM4,600 per day as LAD. On the facts, we found no reason why the defendant should not be paid the LAD as agreed by the plaintiff.

[29] The plaintiff argued that the defendant failed to give notice to the plaintiff on the defendant's intention to claim for LAD as required under cl 40.1. We found no specific format of notice prescribed by the contract. In our view, on the facts and circumstances of the case where, according to the defendant, the plaintiff had prematurely filed this action before the contract flow could be completed, the defendant's counterclaim is sufficient notice to the plaintiff of the LAD. The failure of the defendant to give a separate notice on the LAD and/or the failure to issue a final account to the plaintiff, in our view did not in itself absolve the plaintiff's liability to pay the LAD at the agreed rate.

[30] On the other two heads of the defendant's counterclaim, we found no compelling reason to disturb the finding of the learned judge.

[31] The defendant had not produced the sale and purchase agreements with the various purchasers to support its claim for LAD in respect of late delivery of the houses to the purchasers. There was nothing to show who were the purchasers, what was the period of delay (which depended on the date of the agreements) and how much was the defendant liable to pay to each of the purchasers, to enable the court to make an order on the counterclaim for LAD to the purchasers.

[32] Likewise, the defendant failed to prove the amount claimed being the difference between the contract sum and the additional cost and expenses incurred by the defendant to complete the project. The document relied upon by the defendant to prove this claim was the summary of payment (appeal record Vol 2H: pp 1231–1232). We found the summary of payment bereft of

particulars as to who were the new or other contractors or persons engaged by the defendant to complete the project, how much was in fact paid and when was the payment made. We concurred with the learned judge that the summary of payment tendered by the defendant was not sufficient proof of the amount claimed against the plaintiff for the differential sum under cl 55 of the contract.

CONCLUSION

[33] For the foregoing reasons, we were unanimous in our decision that there were merits in the defendant's appeal in respect of the plaintiff's claim. In our judgment, the plaintiff had failed to discharge the burden of proof on the balance of probabilities on the 37% claimed.

[34] We found that the learned judge was plainly wrong in relying solely on the defendant's letters dated 13 August 2015 and 6 October 2015 without considering that the 37% was in conflict with another letter issued thereafter, dated 12 November 2015 and without considering the evidence of SD1, the authorised quantity surveyor who did the final calculation.

[35] Except for the claim of LAD against the plaintiff for RM4,600 per day, we found no reason to disturb the learned judge's decision in dismissing the rest of the defendant's counterclaim.

[36] The defendant's appeal against judgment for the plaintiff was therefore allowed. We set aside the order of the High Court and we substituted with an order that the defendant do pay the plaintiff 27.15% of the work done. As the defendant had made some payments to the plaintiff, we directed that parties work out the figure for the said percentage.

[37] As for the defendant's appeal against the dismissal of the counterclaim, given that there was no dispute on the delay by the plaintiff to complete the project, no further onus lies upon the defendant to prove its claim for LAD. The appeal was thus allowed in part. The order of the High Court was varied to the extent that we allowed the defendant's counterclaim only in respect of the LAD for late completion of the work by the plaintiff from 6 October 2015–2 June 2016 (as per the alternative submission of learned counsel for the defendant) at RM4,600 per day amounting to RM9,894,600 with interest at the rate of 5%pa from the date of filing of counterclaim until realisation and costs.

Appeal allowed in part.

Reported by Afiq Mohammad Noor